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8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE EASTERN DISTRICT OF CALIFORNIA

10 BRYAN RAY NEWMAN,

11 Plaintiff,

No. CIV S-05-0694 WBS CMK

12 vs.

13 JO ANNE B. BARNHART,
14 Commissioner of Social Security,

15 Defendant.

FINDINGS AND RECOMMENDATIONS

16 _____/
17 Plaintiff, Bryan Ray Newman, brings this action for judicial review of a final
18 decision of the Commissioner of Social Security pursuant to 42 U.S.C. § 405(g) and Local Rule
19 72-302. The parties have filed cross motions for summary judgment.

20 I. Background

21 Plaintiff applied for supplemental security income benefits (SSI) on April 30,
22 2002, based on disability. Plaintiff claims that he is unable to work due to sciatica in both legs,
23 chronic back pain, muscle spasms, severe headaches, illiteracy, depression, and poor memory
24 and concentration. Plaintiff testified that the biggest problem that keeps him from working is
25 pain in his back and legs. Plaintiff has an eleventh grade education and had previously worked
26 as a cook. Plaintiff stated that he had worked for about a week providing in-home support after
he filed his SSI application but has done no other work since his filing date.

1 Plaintiff's application was denied initially and upon reconsideration. A hearing
2 was held before administrative law judge (ALJ), Robert K. Rogers on June 2, 2004.

3 In his, November 12, 2004 decision, the ALJ made the following findings:

- 4 1. The claimant has not engaged in substantial gainful activity since the
5 alleged onset date of disability.
- 6 2. The medical evidence establishes that the claimant has the following
7 severe impairments: degenerative disc disease, Hepatitis A and B, bowel
8 and bladder dysfunction, antisocial personality disorder, borderline
9 intellectual functioning, and substance abuse disorder.
- 10 3. These medically determinable impairments do not meet or medically equal
11 one of the listed impairments in Appendix I, Subpart P, Regulation No. 4.
- 12 4. With substance abuse, the claimant is able to perform a full range of
13 medium work activity; but he cannot perform on a consistent basis, relate
14 to supervisors, understand, remember or carry out complex instructions, or
15 complete a workday or workweek without interruption.
- 16 5. Substance abuse disorder is a medically determined condition that
17 materially contributes to the finding that the claimant is disabled.
- 18 6. If the claimant were to stop using drugs and alcohol, he would continue to
19 have severe impairments which would not meet or medically equal one of
20 the listed impairments in Appendix I, Subpart P, Regulation No. 4.
- 21 7. The undersigned finds the claimant's allegations regarding his limitations
22 are not credible for the reasons set forth in the body of the decision.
- 23 8. If the claimant were to stop using alcohol, he retains the ability to perform
24 a full range of medium work functions.
- 25 9. The claimant's past relevant work as a cook does not require the
26 performance of work-related activities precluded by his residual functional
capacity.
10. If the claimant were to stop using alcohol, he is capable of performing his
past relevant work as a cook.
11. Thus, substance abuse is a factor material to the finding of disability in
this case because the claimant would not be disabled if he stopped using
alcohol. Therefore, in accordance with Section 105 of Public Law 104-
121, the claimant is ineligible for disability payments under Title II and
Title XVI of the Act.

(TR at 18.)

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1 Based on these findings, the ALJ concluded that plaintiff was not eligible for SSI
2 payments under the Act. The decision of the ALJ became final when the Appeals Council denied
3 plaintiff's request for a review on February 5, 2005. The plaintiff filed a timely appeal in this
4 court on April 8, 2005.

5 II. Standard of Review

6 This court's review is limited to whether the Commissioner's decision to deny
7 benefits to plaintiff is based on proper legal standards under 42 U.S.C. § 405(g) and supported
8 by substantial evidence on the record as a whole. See Copeland v. Bowen, 861 F.2d 536, 538
9 (9th Cir. 1988) (citing Desrosiers v. Secretary of Health and Human Services, 846 F.2d 573,
10 575-76 (9th Cir. 1988)). Substantial evidence means more than a mere scintilla of evidence, but
11 less than a preponderance, Saelee v. Chater, 94 F.3d 520, 521 (9th Cir. 1996) (citing Sorensen v.
12 Weinberger, 514 F.2d 1112, 1119 n.10 (9th Cir. 1975)). "It means such evidence as a reasonable
13 mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389,
14 402, 91 S. Ct. 1420 (1971) (quoting Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229, 59
15 S. Ct. 206 (1938)). The court must consider both evidence that supports and evidence that
16 detracts from the Commissioner's decision, but the denial of benefits shall not be overturned
17 even if there is enough evidence in the record to support a contrary decision. See Jones v.
18 Heckler, 760 F.2d 993, 995 (9th Cir. 1985). If substantial evidence supports the administrative
19 findings, or if there is conflicting evidence supporting a finding of either disability or
20 nondisability, the finding of the ALJ is conclusive, see Sprague v. Bowen, 812 F.2d 1226, 1229-
21 30 (9th Cir. 1987), and may be set aside only if an improper legal standard was applied in
22 weighing the evidence. See Burkhart v. Bowen, 856 F.2d 1335, 1338 (9th Cir. 1988).

23 III. Discussion

24 In his motion for summary judgment, plaintiff argues that the ALJ erred in four
25 ways: (1) the ALJ erred in finding that plaintiff's alleged substance abuse was a material factor
26 in his disability; (2) the ALJ failed to provide legitimate reasons for rejecting the opinions of

1 plaintiff's treating physicians and the consultative examiners; (3) the ALJ did not provide a
2 legitimate reason for not crediting plaintiff's testimony; and (4) the ALJ failed to include all
3 plaintiff's limitations in the hypothetical proposed to the vocational expert.

4 A. Substance Abuse

5 Plaintiff argues that the ALJ erred in finding that plaintiff's substance abuse was
6 a material factor in his disability. The court finds that the ALJ did not err in his conclusion.

7 An ALJ must conduct the five-step disability inquiry¹ without separating out the
8 impact of substance abuse. See Bustamante v. Massanari, 262 F.3d 949, 954 (9th Cir. 2001). If
9 the ALJ finds that the claimant is disabled and there is medical evidence of drug addition or
10 alcoholism, then the ALJ must determine the plaintiff would still be disabled if the claimant
11 stopped using alcohol or drugs. See id.; 42 U.S.C. § 416(I); 20 C.F.R. 416.935 (2005). In other
12 words, an ALJ must make a finding of disability before he or she can determine if alcohol or
13 drug use is a material factor in a plaintiff's disability.

14 At step two, the ALJ properly considered evidence of plaintiff's substance abuse
15 problem along with his other impairments. See Bustamante, 262 F.3d at 954. Specifically, the
16 ALJ considered that plaintiff had several severe impairments—degenerative disc disease,
17 Hepatitis A and B, bowel and bladder dysfunction, antisocial personality disorder, intellectual
18 functioning and substance abuse disorder. (TR 12.) The ALJ recognized the severity of
19 plaintiff's mental impairments, including substance abuse, and carefully considered whether
20 these impairments met a medical listing. (TR 12;) see Bustamante, 262 F.3d at 954. Based on
21 the medical evidence, the ALJ found that plaintiff's impairments, although severe, did not meet
22 or equal a medical listing. (TR 12.)

23 The ALJ found, however, that based on the medical record and plaintiff's
24 testimony, that plaintiff was "not able to perform on a consistent basis; relate to supervisors,

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26 ¹20 C.F.R. § 416.920 (2005).

1 understand, remember or carry out detailed or complex instructions; or complete a workday or
2 workweek without interruption since April 30, 2002 due to combined impairments arising out of
3 his substance abuse disorder and resultant antisocial personality disorder.” (TR 12.) On these
4 grounds, the ALJ concluded that plaintiff was disabled. (TR 12.) The ALJ noted that the record
5 revealed significant evidence that plaintiff had an alcohol problem. (TR 12-13.)

6 Specifically, the ALJ noted the following. Plaintiff admitted to imbibing two
7 beers per day (TR 12, 144-146.) Drs. Regazzi and Stearns both opined that plaintiff had a
8 significant alcohol problem. (TR 12, 147, 156.) The ALJ observed that the record clearly
9 established that plaintiff’s alcohol use limited plaintiff’s ability to function. (TR 12.) This
10 finding was consistent with Dr. Regazzi’s opinion that plaintiff’s substance abuse caused him
11 problems when relating to his co-workers, supervisors and the public and impaired his ability to
12 maintain stable work habits and with Dr. Stearns’s opinion that plaintiff’s alcohol use
13 exacerbated all of his symptoms. (TR 148, 156.)

14 The ALJ next properly considered whether plaintiff would be disabled without his
15 alcohol problem. (TR 13, 15.) The ALJ found that, if plaintiff stopped using alcohol, he would
16 still have degenerative disc disease, Hepatitis A and B and bladder, bowel dysfunction, antisocial
17 personality disorder and borderline intellectual functioning. (TR 13.) The ALJ considered
18 whether these impairments, individually or in combination, would meet or equal the medical
19 listings. (TR 13.) The ALJ found that none of plaintiff’s remaining impairments, individually or
20 in combination, would meet or equal the medical listings. (TR 13, 15.)

21 The ALJ noted that physical assessments of plaintiff conducted in early 2004
22 indicated that plaintiff could perform less than a full range of sedentary work. (TR 13) However,
23 the ALJ assigned both assessments minimal weight because both were based on subjective
24 complaints and not supported by the objective medical findings. (TR 13.) The ALJ afforded
25 significant weight to the opinion of Dr. Wirganowicz that plaintiff had no functional limitations,
26 but limited climbing, balancing, kneeling, crouching, crawling, and stooping on an occasional

1 basis because this opinion was consistent with the record and well supported by objective
2 evidence. (TR 15, 161-165.) Plaintiff argues that the ALJ improperly disregarded his functional
3 limitations. However, the record shows that the ALJ relied on the opinion of a non-treating
4 physician which was based on objective clinical reports. See Andrews v. Shalala, 53 F.3d 1035,
5 1041 (9th Cir. 1995) (“Where the opinion of the claimant's treating physician is contradicted, and
6 the opinion of a nontreating source is based on independent clinical findings that differ from
7 those of the treating physician, the opinion of the nontreating source may itself be substantial
8 evidence; it is then solely the province of the ALJ to resolve the conflict.”)

9 Having determined plaintiff's physical limitations, the ALJ went on to consider
10 which of plaintiff's mental limitations would remain if plaintiff stopped using alcohol and then
11 determined whether the remaining limitations would equal or meet a medical listing. (TR 15.)
12 The ALJ found that plaintiff's remaining impairments of antisocial personality disorder and
13 borderline intellectual functioning would result in no limitations if plaintiff stopped drinking.
14 (TR 15) The ALJ observed that plaintiff was able to travel between his mother's house and his
15 girlfriend's house, watched television, was able to self-groom, walked and cooked for himself.
16 (TR 15, 76-77.) This is consistent with opinion of Dr. Regazzi, who opined that plaintiff did not
17 appear to have any restrictions on his daily activities. (TR 148.)

18 The ALJ found that, if plaintiff were to stop using alcohol, he would experience
19 only mild difficulties in maintaining social function. (TR 15.) Specifically, the ALJ noted that
20 both Drs. Regazzi and Stearns observed that plaintiff was cooperative upon examination and
21 joked and laughed during his interview. (TR 15, 146, 155.) Both doctors also observed that,
22 despite plaintiff's alcohol use, he was capable of understanding, remembering and carrying out
23 simple instructions. (TR 148, 157-158.)

24 The court finds that the ALJ properly determined that alcohol abuse was a
25 material factor contributing to plaintiff's disability. See Bustamante, 262 F.3d at 954. The ALJ
26 properly considered plaintiff's substance abuse along with his other impairments, and, after

1 making a disability determination, considered whether plaintiff would still be disabled if he
2 stopped using alcohol. See 20 C.F.R. § 416.935 (2005). The ALJ's decision was based on the
3 proper legal standards and is supported by substantial evidence in the record. See Saelee, 94
4 F.3d at 521. The court recommends that this claim be denied.

5 B. Opinions of Treating Physician and Consultative Examiners

6 Plaintiff argues that the ALJ failed to provide legitimate reasons for discounting
7 the opinions of his treating physician and the opinions of three consultative examiners. The
8 court disagrees.

9 "The opinion of a treating physician is not necessarily conclusive as to either the
10 physical condition or the ultimate issue of disability." Morgan v. Apfel, 169 F.3d 595, 600 (9th
11 Cir. 1999). An ALJ may reject the uncontradicted opinion of a treating physician only for "clear
12 and convincing" reasons. See Lester v. Chater, 81 F.3d 821, 831 (9th Cir. 1995). When
13 conflicting medical evidence is presented, however, the ALJ must resolve the conflict. See
14 Andrews, 53 F.3d at 1041. Although the treating physician's opinion is given deference, the
15 ALJ may reject the opinion of the treating physician in favor of a contradicting opinion of an
16 examining physician, providing the ALJ makes findings setting forth specific, legitimate reasons
17 for doing so that are based on substantial evidence in the record. See Magallanes v. Bowen, 881
18 F.2d 747, 751 (9th Cir.1989). The ALJ may satisfy this requirement by setting out a summary of
19 the facts and conflicting clinical evidence, stating his interpretation thereof, and making findings.
20 See Thomas v. Barnhart, 278 F.3d 947, 957 (9th Cir. 2002).

21 The ALJ's interpretation of conflicting medical evidence is supported by
22 substantial evidence in the medical records and reflected in his factual findings.

23 Plaintiff's medical records reveal that plaintiff had been treated for low back pain,
24 which radiated into his legs and that plaintiff reported numbness and weakness in his legs and
25 feet. (TR 13.) The ALJ considered plaintiff's complaints of chronic bowel and bladder
26 dysfunction, and further noted that laboratory tests indicated that plaintiff was positive for

1 Hepatitis A and B and x-rays revealed evidence of degenerative disc disease. (TR 13, 105, 111.)
2 The ALJ considered Dr. Gregory Hahn's, plaintiff's treating physician, and Dr. Robert Mattos's
3 evaluations of plaintiff. Both physicians assessed plaintiff's ability as able to perform at less
4 than a sedentary level. (TR 13, 135, 124-27.) The ALJ considered both assessments, noted that
5 both assessments were based largely on plaintiff's subjective complaints and not on objective
6 clinical medical evidence, and afforded them both minimal weight.

7 The ALJ considered the opinion of consultative examining orthopedist, Philip
8 Wirganowicz, M.D. The ALJ noted that Dr. Wirganowicz examined plaintiff's reflexes and
9 found them to be within normal limits; observed that plaintiff's gait was without limp; and
10 considered that radiographs of plaintiff's lumbosacral spine revealed minimal degenerative
11 changes, which were consistent with plaintiff's age. (TR 14.) The ALJ found that Dr.
12 Wirganowicz's opinion was consistent with the record, well-supported by objective findings, and
13 therefore, accorded it significant weight. (TR 14.)

14 The ALJ also fully considered the opinions of consultative examining
15 psychologists, Drs. Regazzi and Stearns, both of whom noted that plaintiff's affect was normal
16 and that plaintiff laughed and joked during his interview. (TR 14, 146, 155.) The ALJ
17 considered that both psychologists commented on plaintiff's history of alcohol abuse and
18 diagnosed alcohol dependence. (TR 14, 144, 147, 154, 156.) The ALJ considered that both Drs.
19 Regazzi and Stearns concluded that plaintiff was capable of understanding and carrying out
20 simple instructions and that his alcohol abuse adversely affected his mental functioning
21 capabilities. (TR 14, 148, 156-159.) The ALJ found Dr. Regazzi's and Dr. Stearns's
22 conclusions "especially persuasive and accord[ed] them great weight." (TR 14.)

23 The court finds that the ALJ indicated that he discredited the treating physician's
24 opinion and the consultative examining internist's opinion because they could not be supported
25 by the objective clinical evidence. For example, the record indicates that, when rendering his
26 opinion regarding plaintiff's functional difficulties, Dr. Mattos noted that "Claimant feels very

1 uncomfortable and muscle pain and back pain.” (TR 129.) The court finds that the ALJ
2 weighed the conflicting medical evidence and acted in accordance with his duty to determine the
3 credibility of the evidence, and gave specific, legitimate reasons for discrediting the opinions of
4 Drs. Hahn and Mattos. See Thomas, 278 F.3d at 958.

5 The court finds that the ALJ gave proper weight to the opinions of Drs. Stearns
6 and Regazzi. Plaintiff argues that, although the ALJ stated that he gave these assessments great
7 weight, he, in fact, did not credit these opinions. Specifically, plaintiff pointed out that neither
8 doctor indicated that plaintiff’s severe mental impairments would disappear if he stopped using
9 alcohol. A review of the record indicates that both doctors noted plaintiff’s alcohol abuse. (TR
10 149, 148, 154, 157.) Dr. Regazzi specifically noted that plaintiff’s substance abuse problems
11 contributed to his inability to interact with supervisors, co-workers and the public. (TR 148.)
12 The court finds that the record supports the conclusions that the ALJ drew from the opinions of
13 Drs. Stearns and Regazzi and indicates that the ALJ did not improperly discount their opinions.
14 See Saelee, 94 F.3d at 521, see also, Magallanes, 881 F.2d at 753 (ALJ need not believe each
15 aspect of physician’s opinion to credit portions of that opinion).

16 Accordingly, plaintiff’s claim that the ALJ failed to provide legitimate reasons for
17 discounting the opinions of his treating physician and the opinions of three consultative
18 examiners should be denied.

19 C. Failure to Credit Plaintiff’s Opinion

20 Plaintiff argues that the ALJ failed to provide a legitimate basis for rejecting his
21 testimony of disabling limitation. The court disagrees.

22 If the ALJ finds a claimant’s testimony as to the severity of his pain and
23 impairments unreliable, then the ALJ must make a credibility determination with findings
24 specific enough to permit the court to conclude that the ALJ did not arbitrarily discredit
25 claimant’s testimony. See Thomas, 278 at 958-59; Bunnell v. Sullivan, 947 F.2d 341, 344 (9th
26 Cir. 1991)(en banc). In determining whether subjective complaints are credible, the ALJ should

1 first consider objective medical evidence and then consider other factors. See Bunnell, 947 F.2d
2 at 344. The court may also consider the following factors: (1) the applicant's reputation for
3 truthfulness, prior inconsistent statements or other inconsistent testimony, (2) unexplained or
4 inadequately explained failure to seek treatment or to follow a prescribed course of treatment,
5 and (3) the applicant's daily activities. See Smolen v. Chater, 80 F.3d 1273, 1284 (9th Cir.
6 1996); see generally SSR 96-7P, 61 FR 34483-01; SSR 95-5P, 60 FR 55406-01; SSR 88-13.
7 Work records, physician and third party testimony about nature, severity, and effect of
8 symptoms, and inconsistencies between testimony and conduct also may be relevant. See Light
9 v. Social Security Administration, 119 F.3d 789, 792 (9th Cir. 1997). If the ALJ's credibility
10 finding is supported by substantial evidence in the record, the court may not engage in second
11 guessing. See Morgan v. Comm'n of Social Sec. Admin., 169 F.3d 595, 600 (9th Cir. 1999).

12 The ALJ's credibility determination is supported by substantial evidence in the
13 record. The ALJ considered that, while plaintiff's back x-rays indicated only mild degenerative
14 changes, plaintiff complained of suddenly worsening lower back pain. (TR 16, 105.) The ALJ
15 noted that there were inconsistencies between the objective medical record and plaintiff's
16 subjective complaints of pain. See Morgan, 169 F.3d at 600. The ALJ considered that, despite
17 plaintiff's complaints of back pain, he had not sought physical therapy or chiropractic treatment.
18 (TR 17); see Johnson v. Shalala, 60 F.3d 1428, 1434 (9th Cir. 1995) (stating that ALJ may
19 consider the conservative nature of treatments when evaluating subjective complaints). The ALJ
20 noted that although plaintiff alleged bowel and bladder dysfunction and mental health problems,
21 plaintiff never sought treatment for any of these issues. (TR 17); see id. The ALJ observed that
22 despite testing positive for Hepatitis A and B, plaintiff had not reported excessive fatigue or
23 other symptoms associated with these conditions. See Miller v. Heckler, 770 F.2d 845, 849 (9th
24 Cir. 1985)(plaintiff must document nonexertional impairments). The ALJ also noticed that,
25 despite using a cane for a period of time, plaintiff did not pursue a replacement for his cane when
26 it was broken. (TR 17); see Johnson, 60 F.3d at 1434. Finally, the ALJ noted that plaintiff's

1 described conditions did not keep him from leaving the house daily, going for walks and getting
2 together with family and friends at special times. (TR 17.)

3 The court finds that the ALJ's specific credibility findings are supported by
4 substantial evidence in the record. See Morgan, 169 F.3d at 600 (when ALJ's credibility finding
5 is supported by substantial evidence in the record, a court may not engage in second guessing).
6 Accordingly, the court recommends that plaintiff's claim that the ALJ improperly assessed his
7 credibility be denied.

8 D. Hypothetical Questions

9 Plaintiff's final claim is that the ALJ failed to include all of his limitations in the
10 hypothetical posed to the vocational expert. At the fourth step, the ALJ determines whether a
11 claimant can perform his past relevant work. See 20 C.F. R. §§ 404. 1520(e), 416.920(e). The
12 ALJ reviews a claimant's residual functional capacity and the physical and mental demands of
13 work that he previously performed. See id.; Matthews v. Shalala, 10 F.3d 678, 680-81 (9th Cir.
14 1993). This inquiry, as to whether a claimant may perform his past relevant work, does not
15 require the use of a vocational expert. See Crane v. Shalala, 76 F.3d 251, 255 (9th Cir. 1996).

16 Here, the ALJ determined that plaintiff could perform a full range of medium
17 work, if he stopped using alcohol. The vocational expert testified that plaintiff had performed
18 past relevant work as a cook, which is a medium exertional level work. (TR 196.) The ALJ was
19 entitled to rely on the vocational expert's testimony in making his determination that plaintiff
20 could perform his past relevant work.

21 Although the ALJ called a vocational expert to testify at the hearing, the
22 testimony of the expert was not needed; the ALJ could determine plaintiff's residual functional
23 capacity independently. See Crane, 76 F.3d at 255. Accordingly, any failure by the ALJ to
24 include the proper limitations in his questions to the expert was a harmless error, because the
25 alleged error would not have affected the ALJ's decision that if he stopped using alcohol,
26 plaintiff would not be disabled. See Brawner v. Secretary of HHS, 839 F.2d 432, 433 (9th Cir.

1988). Accordingly, the court recommends that this claim be denied.


IV. Conclusion

The ALJ's decision is fully supported by substantial evidence in the record and based on the proper legal standards. Accordingly, IT IS RECOMMENDED that:

1. Plaintiff's motion for summary judgment or remand be denied, and
2. The Commissioner's cross motion for summary judgment be granted.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within ten days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections shall be served and filed within ten days after service of the objections. The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. See Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

DATED: August 17, 2006.


CRAIG M. KELLISON
UNITED STATES MAGISTRATE JUDGE